No. 408.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN H. WISE, as Collector of the Port of San Francisco, State of California,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Importer of Certain Creosote, Merchandise, etc.,
Appellee.

APPELLANT'S BRIEF

SAMUEL KNIGHT,
Ass't U. S. Attorney.

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STATEMENT OF THE CASE.

The merchandise in question, consisting of 2,200 barrels of the article hereinafter mentioned and described in the invoices as "liquid creosote," was imported from

London, England, into the United States, at the Port of San Francisco, State and Northern District of California, on the 19th day of March, 1895, by the Southern Pacific Company, appellee herein, and thereupon said merchandise was entered at the Customhouse at this port for immediate consumption. It was thereafter by appellant, John H. Wise, as Collector of Customs, classified upon the return of the appraiser of such port as "distilled oil," dutiable at the rate of twenty-five per cent. ad valorem, under paragraph 60 of the Tariff Act of August 27, 1894, (28 U. S. Stats., at p. 509), the said entries were liquidated in accordance with this classification, and the duty upon the merchandise, amounting to the sum of $1.472, was ascertained, levied and collected by appellant as such Collector.

Thereupon appellee appealed to the Board of United States General Appraisers on the ground that the merchandise in question was not a distilled oil, but should be admitted free of duty under paragraph 413 of the Act of August, 1894, as a product of coal tar, not specially provided for; and the Board sustained the decision of the Collector, holding and deciding that the merchandise in controversy was not a product of coal tar, admissible free of duty, but was a distilled oil, subject to a duty of twenty-five per cent. ad valorem, under parapraph 60 of the Tariff Act referred to. The importer then applied to the Court below for a review of the questions of law and fact involved in the decision of the Board of General Appraisers under the Customs Administrative Act of

June 10, 1890; and the Court reversed the Appraisers' decision, holding that the merchandise was a product of coal tar, and not known as a distilled oil, and therefore, governed exclusively by paragraph 443 of the Act of 1894. The Collector appeals.

POINTS AND AUTHORITIES.

Appellant contends that:

(*1.*) *Products of coal tar are not free of duty under paragraph 443 of the Tariff Act of August 27, 1894.*

(*2.*) *The merchandise in controversy is known as a distilled oil, as well as a product of coal tar; and even if embraced within the terms of paragraph 443 is, nevertheless, more properly provided for under paragraph 60 of the Tariff Act referred to.*

I.

PRODUCTS OF COAL TAR ARE NOT FREE OF DUTY UNDER PARAGRAPH 443 OF THE TARIFF ACT OF AUGUST 27, 1894.

The importer's protest against the action of the Collector of the Port must be specific, and the Southern Pacific Company is limited to it.

Act of June 10, 1890, Sec. 14.
In re Gerdau 54 Fed. Rep., 143.
U. S. v. Curley, 66 Fed. Rep., 720.

In its protest the importer claims that the article in controversy is not a distilled oil and dutiable as such under paragraph 60 of the Wilson Tariff Act; but that it is a product of coal tar and admissible free of duty

under paragraph 443 of the same Act. If, therefore, products of coal tar are not free of duty under such paragraph, appellee's case must fail, regardless of what the substance is, its commercial character or rate of duty applicable thereto.

This leads us to consider the proper construction of *paragraph 443* of the free list of the *Wilson Act*. It reads: "Coal tar, crude, and all preparations ex- "cept medicinal coal tar preparations and products "of coal tar, not colors or dyes, not specially pro- "vided for in this Act."

In other words, coal tar, crude, is free of duty, and so are all *preparations* of coal tar not specially provided for in that Act; but medicinal coal tar preparations and *products* of coal tar, and colors and dyes therefrom are not free. Generally speaking, therefore, preparations of coal tar, not specially provided for, are free and products of coal tar are not free, but must be included within some of the schedules of duty which precede the free list.

A reference to the *McKinley Act of October 1, 1890*, illustrates and tends to sustain this contention, and shows that this distinction was then recognized by Congress:

Paragraph 538 provided that "coal tar, crude," was free.

Paragraph 731 provided that "tar * * * and pitch of coal tar" was free.

Paragraph 19 provided that "all preparations of coal tar," with certain exceptions, were dutiable at 20 per cent. ad valorem.

Paragraph 76 provided that "products or preparations known as * * * distilled oils * * * * not specially provided for" were dutiable at 25 per cent. ad valorem; and by referring to the preceding *Tariff Act of March 3, 1883 (22 Stats. at L., at p. 493,)* we find:

"Coal tar, crude, ten per centum ad valorem; coal "tar, products of, such as naphtha, benzine, benzole, "dead oil, and pitch, twenty per centum ad valorem. "All coal tar colors or dyes, by whatever name "known, and not specially enumerated or provided "for in this Act, thirty-five per centum ad valo- "rem. All preparations of coal tar, not colors "or dye, not specially enumerated or provided for in "this Act, twenty per centum ad valorem."

Thus we see, without further notice of earlier tariff acts, that Congress made a distinction between *preparations* and *products* of coal tar.

This prompts us to ascertain what the difference is between a *preparation* and a *product.*

Says the *Century Dictionary:*

"Prepare, * * *; to adapt by alteration or ar- "rangement * * *; 4. To provide or procure for "future use; hence, to make; form; compound; manu- "facture; * * *" "Preparation, * * * "2. Formation; composition; manufacture, as the "preparation of gun powder; the preparation of "glycerine, * * * 7. That which is prepared, "manufactured or compounded; as a chemical prepa- "ration, a preparation of oil and wax; * * *"

"Produce, * * * To bring forth; generate;

" bear; furnish; yield; * * * To bring into being " or form * * *;" "Product, that which is pro- " duced * * *; In chemistry a compound not " previously existing in a body, but formed during " decomposition; as the products of destructive dis- " tillation; contradistinguished from educt."

The petitioner does not claim that the article is a *preparation* of coal tar, but that it is a *product.* Under his protest, therefore, he can not be heard to say that such article should be admitted free of duty as a *preparation* of coal tar. Besides, as a matter of fact it is not a preparation but a product, obtained from coal tar admittedly by a process of destructive distillation.

Says *Sadtler* in his work on *Industrial Organic Chemistry, p. 329*:

" Destructive distillation has been defined as ' the " ' decomposition of a substance in a close vessel in " ' such a manner as to obtain liquid products.' It " must be observed here that the word product is " used to indicate something not originally present in " the substance distilled. A body may be obtained " in the liquid distillate which has merely been " driven over by heat and which already existed in " the original material in physical or mechanical ad- " mixture. Such a body is, to speak exactly, an " *educt* and not a *product.*"

The constituents of the creosote before the Court are the result of the decomposition of other substances by destructive distillation and are not merely *educed* or *drawn* from the basic material in their original

condition. There are countless preparations of coal tar, and also there are innumerable products therefrom, as we shall shortly show. Prof. Price, for instance, one of the witnesses called in the importer's behalf testified to this difference upon his cross-examination. His testimony upon this point reads (Transcript, pp. 80–82):

"Q. There are other products of coal tar besides distilled oil, are there not, Professor?

A. Yes, sir.

Q. What other products (products or educts, I use the term in a general way) are there of this coal tar, Professor?

A. I understand your meaning. There are a great many others. For instance, nearly all of the coloring materials that are now in use are derived from coal tar.

Q. But they are not distilled oils, are they?

A. No, sir. They are separated from some of these products, like from this creosote material.

Q. That is to say, they are separated by acids?

A. They are separated by acids and by alkalies, depending entirely upon what it is—by regular chemical operation.

Q. As a matter of fact, Professor, there are hundreds and hundreds of products which are derived from coal tar, are there not?

A. Yes, sir.

Q. The products of coal tar are almost innumerable, are they not?

A. Yes, sir.

Q. And a great many of those products are not what would be ordinarily known as distilled oil?

A. No, sir; they would not. They have been ob-

tained, however, from a product that was once distilled. For instance, you take sulphenol, which I sometimes take, and phenacetin—all of those are compounds of coal tar.

Q. The coal tar is originally distilled, in order to get the substance which the phenacetin or these various other products are produced from?

A. Yes, sir.

Q. Phenacetin is in the form of a powder, is it not?

A. Yes, sir. For instance, in order that we may be thoroughly understood, I will say this: If one takes coal tar, which is one of the by-products in the manufacture of coal gas, and breaks it up roughly, he will have the four main products that I have mentioned, or four divisions.

Q. That is to say, there are four main divisions?

A. Yes, sir. Then you take each one of those main divisions, and it can in turn be broken up, and from it innumerable compounds produced. I suppose the compounds of coal tar can be reckoned up into the thousands at the present time. They are simply the result of working further along one of those four lines, along the line of the first, second, third or fourth main product.

Q. That is, you take the various products derived from the first, second, third and fourth fractional distillations, we will say.

A. Yes, sir.

Q. And you would, by working those products further, for instance by acids, or by other treatment, get all those innumerable substances as a result?

A. Yes, sir.

Q. Some of them would be derived from the product of the first distillation?

A. Yes, sir.

Q. And some would be derived from the product of the second, and some from the third, and some from the fourth distillation?

A. Yes, sir, making them into other compounds."

If the Court will read this testimony in the light of the definitions *supra* it will become manifest that the importer's merchandise is not entitled to be admitted free of duty, inasmuch as it is not a preparation of coal tar, and is not so designated in the protest.

II.

THE MERCHANDISE IN CONTROVERSY IS KNOWN AS A DISTILLED OIL, AS WELL AS A PRODUCT OF COAL TAR; AND EVEN IF EMBRACED WITHIN THE TERMS OF PARAGRAPH 443, IS NEVERTHELESS MORE PROPERLY PROVIDED FOR UNDER PARAGRAPH 60 OF THE TARIFF ACT OF 1894.

If the foregoing interpretation of paragraph 443 is not correct, let us concede, for the argument, that Congress has provided in this paragraph for the free admission of products of coal tar, not specially provided for. What then? We contend it is specially provided for in *paragraph 60 of the same Act*, which reads:

" Products or preparations known as alkalies, alka-
" loids, distilled oils, essential oils, expressed oil, ren-
" dered oils, and all combinations of the foregoing,
" and all chemical compounds and salts, not specially
" provided for in this Act, twenty-five per centum ad
" valorem."

While it is the recognized practice of an appellate court ordinarily not to disturb findings of the lower court drawn from conflicting evidence, *it will do so not only where the evidence is insufficient to sustain such findings but also where the evidence is largely documentary.*

The Supreme Court of the State of California has, in a very recent decision, stated what the proper practice is in this respect, saying in

Wiester vs. *Wiester*, decided May 29, 1897,

that where the evidence is largely documentary, being contained in the depositions of witnesses, the opportunities of the appellate court to judge of its value are as good as those of the court below, and the general doctrine that the appellate court will not interfere in a case of substantial conflict of evidence has no application.

The testimony in the case at bar consists, under sections 14 and 15 of the Act of June 10, 1890, of the papers embraced in the return of the Board of U. S. General Appraisers to the Court below, as well as the depositions of certain witnesses who testified before that tribunal, and the further depositions of witnesses called by the importer, (and in one instance by the Collector,) which were taken before a General Appraiser as Referee, together with the exhibits offered in evidence. There is absolutely no oral evidence taken before the Court below, and it had no advantages or facilities in arriving at its findings of fact and conclusions in this case that this Court does not equally possess. Therefore, under the decision to which we

have just adverted and by reason of the nature of the evidence produced in this case, it is, we submit, within the scope of the Appellate Court's investigation to examine this evidence *de novo*, and ascertain for itself whether or not the findings of fact of which appellant complains is established and sustained by a fair preponderance of testimony, as well as to determine whether or not there is sufficient evidence to support it.

The Court below found as a fact that

" Said merchandise was not, nor is it, a product or " preparation commonly, or commercially, or chemi- " cally, or otherwise, known as a distilled oil " (Transcript p. 49.)

The terms "distilled oil" and " product of coal tar" are not commercial terms, but are used to denote the origin or process of manufacture of the article.

Vid. Return of Board of General Appraisers, testimony of Isaac D. Fletcher, (Transcript, p. 22), W. H. Rankin (Transcript, p. 24), Alfred H. Smith (Transcript, p. 36), James Hartford (Transcript, p. 42), Harry Comer (Transcript, p. 39), Opinion of Board of Appraisers (Transcript, p. 45); and the testimony of Prof. Thomas Price (Transcript, pp. 73, 74), Harry East Miller (Transcript, p. 96), W. M. Searby (Transcript, pp. 107, 109, 110), taken in the appellee importer's behalf, and Dr. C. A. Kern's testimony (Transcript, pp. 137, 139), taken for the appellant Collector.

Admitting that the substance in controversy is a product of coal tar, it is also a distilled oil. Every witness states that it is produced by distillation; and, with one or two exceptions, that it is known to be an oil and so called.

The Appraiser of Merchandise in San Francisco, James E. Tucker (Transcript, p. 13), says that the samples of the merchandise in controversy "are a "distillation product of the coal tar * * * and " correctly returned as distilled oil."

The Chemist of the office of the New York Appraiser of Merchandise, Haydn M. Baker, in a report approved by Dr. Edward Sherer, the Chemist in charge, and Walter H. Bunn, the Appraiser there, says (Transcript, p. 14): "The merchandise as a whole " is an oily body and complicated mixture of chemi- " cal compounds, and also a product of coal tar elim- " inated by distillation."

W. H. H. Childs says the merchandise is an oil (Transcript, p. 17) produced by distillation (Transcript, p. 20), corroborated in both respects more fully by Isaac D. Fletcher (Transcript, pp. 22, 24), and further corroborated by W. H. Rankin (Transcript, p. 23). Alfred H. Smith testifies (Transcript, pp. 27, 31) that the substance is known as an oil " produced by a process known as distillation" (Transcript, p. 32), Harry Comer says (Transcript, p. 37) that he recognizes the merchandise as dead oil; and James Hartford says, the product is one of the distillates of coal tar (Transcript, p. 41). The Board of U. S. General Appraisers thereupon found the sub-

stance to be a distilled oil (Tran., p. 45), and dutiable as such.

When the testimony introduced by the importer and taken before the referee appointed by the lower Court is considered, we are amused at the futile efforts of the witnesses in some instances to avoid admitting that the article in controversy is known as an oil produced from coal tar by the process of distillation. They are rapid and eager in their declarations that it is a product of coal tar, but they avoid the terms "distilled oil" and "oil," as if some contagious disease were lurking there, and thereby fail to realize that they repeatedly contradict themselves in their efforts to escape the dreaded expressions. Prof. Price says, upon his direct examination, that every product, except coke, that comes over from the retort in the application of heat to coal tar, including the substance in question, is called by chemists, as well as commercially, an oil (Transcript, pp. 69–71). "It is a "product of the distillation of coal tar," he evasively replies to the query, "and among the known distilled "oils is the oil in question, is it not?" (Transcript, p. 73.) He further testifies (Transcript, p. 74) that he would know, as matter of fact, that the article is not only an oil produced by distillation from coal tar, but that it is also a product of coal tar. The Court's attention is also directed to the excerpt from his testimony hereinabove given. It now occurs to the learned counsel for appellee that even the term "oil" must be suppressed. Accordingly he opens his redirect examination of this witness (Transcript, pp.

84, 85) and is answered as follows, the witness thereby contradicting his former testimony in this particular. (*Vid. supra*).

"*Mr. Lake.*—Q. Professor Price, I want to ask you this question, in order to get this matter entirely straightened out. I want to be corrected if I am not right. I understood you to say that you would not call this substance an oil at all, that you would call it a product of coal tar. Is that correct?

Mr. Knight.—I object to the question upon the ground, first, that it is ambiguous. The witness should first state whether he is speaking chemically or in the ordinary commercial sense, before he answers the question.

Mr. Lake.—I am speaking chemically now. That is what I intended by the question.

A. No, sir; I would not call that an oil.

Q. I also understood you to say that this substance was not known as a distilled oil, and that you would not so designate it?

A. It is not known as a distilled oil, according to my understanding of a distilled oil.

Q. You simply call it creosote?

A. I would ask for creosote if I wanted that article.

Q. You were also speaking about crude phenols, and you stated that they were carbolic acid?

A. Yes, sir.

Q. Is it not true (I think you stated it before) that that also is called an oil?

A. Yes, sir.

Q. And is obtained by distillation?

A. Yes, sir; it is obtained by distillation.

Q. Is naphthalene called an oil, and is it obtained by distillation?

A. It is obtained by distillation, and I believe it is sometimes also called an oil.

Q. Is not naphtha called one of the lighter oils?

A. Yes, sir; it is called one of the lighter oils.

Q. And is not benzole called one of the lighter oils?

A. Yes, sir."

But the witness in replying to the next question:

"Is there a single substance that is not known by chemists as an oil, which is produced from coal tar by distillation, from the time they begin to apply heat to the coal tar, except coke?"—

again does not strictly adhere to his former testimony in saying:

"In the subdivisions which I have given, they are all called oils."

As counsel did not use the term "produced" as contradistinguished from "educed," and the witness had formerly informed us that there were innumerable preparations and compounds of coal tar that were not distilled oils but were separated by acids and alkalies into powders and similar substances.

Mr. Harry East Miller says on his direct examination (Transcript, p. 91) that the article in controversy is not known as a distilled oil, commercially or chemically, though it is known as an oil produced by distillation (Transcript, p. 92). All products of coal tar by process of distillation are known as oils, except the residuum pitch (Transcript, p. 93). "The whole product I would "call an oil." Upon his cross-examination the witness' admissions come most reluctantly (Transcript, pp. 94-95):

"*Mr. Knight.*—Q. As a matter of fact, it is a dis-
" tilled oil?"

A. In what way, Mr. Knight?

Q. Practically; that is, looking at the process through which it has been put. It is an oil produced from coal tar by distillation?

A. It is no more distilled oil than any other fraction that comes over. Of course, the term "distilled oil" can be applied in that way. It is called an oil, and it is made by the process of distillation.

Q. Mr. Miller, as a matter of fact, is not the substance in the bottle, "Petitioner's Exhibit C," or in any other of these bottles here, produced from coal tar by subjecting the coal tar to a certain degree of heat, the substance passing over being condensed?

A. That is true, yes.

Q. And this substance is the substance that has passed over between certain degrees of temperature?

A. Yes, sir.

Q. That is known as the process of distillation, is it not?

A. Yes, sir.

Q. So that, as a matter of fact, this is an oil produced from coal tar by distillation?

A. I am afraid that would require a definition of the word "oil," which is a most marvelous thing.

Q. Is that not commonly known as an oil?

A. It is commonly known as an oil, yes.

Mr. Lake.—Q. Is it commonly known as an oil, or what?

Mr. Knight.—You can examine the witness again, Mr. Lake; he is now under cross-examination.

Q. As a matter of fact, Mr. Miller, that is actually known as an oil, whether you call it a dead oil or a heavy oil?

A. That term has been applied to it.

Q. And it is commonly and usually known to chemists as an oil of some kind, is it not?

A. Yes, sir, dead oil.

Q. And therefore one of the kinds of oil. Now, it is produced by distillation from coal tar?

A. Yes, sir.

Q. And still do I understand you to say that that would not be known, or is not, as a matter of fact, rather, a distilled oil, striking out the word "known"?

A. Scientifically speaking, or how?

Q I am speaking with reference to the process through which it has been put, with reference to its method of preparation.

A. Well it might possibly be called that, but it is not known as that.

Q. I am not now asking for what it might be called. I want to know, as a matter of fact, regardless of what nomenclature might be applied—regardless of what chemists might call it, or men buying and selling that oil. I say, is it not, as a matter of fact, a distilled oil?

A. No, sir; I would not say it is a distilled oil.

Q. Although it is produced by distillation from coal tar. I want to know what it is, as a matter of fact. I do not care what term is applied.

A. It might be considered as a distilled oil.

Q. Do I understand you to say that you would know it rather as a product or preparation of coal tar than as a distilled oil?

A. That is the way I designate it, yes

Q. Do you mean to say that that is the commercial designation of it?

A. The commercial designation of it is dead oil, or creosote."

Mr. Miller ends his cross-examination (Transcript, pp. 100, 101) by contradicting Professor Price on the commercial use of the expression "product of coal tar," but admits he does not know the commercial term.

W. M. Searby says he is not acquainted with the term "distilled oil" (Transcript, p. 107). He would call the substance in controversy "a portion of coal tar" (Transcript, p. 108). On cross-examination he says he does not know how the term "distilled oil" is applied (Transcript, p. 110) and is not acquainted with the use of terms applied to the article in the importing trade. Mr. Searby, however, distinguishes himself by taking issue with every other witness, contending that the substance is not an oil (Transcript, pp. 111-113-115). He cannot give a definition of oil, however (Transcript, p. 112), admits (Tran- p. 114) "that the way in which we use the term is very arbitrary." John D. Isaacs was recalled to the witness chair, and avers on his direct examination that the article is called an oil (Transcript, p. 128). Dr. C. A. Kern, the Government chemist, was the only witness called in the Collector's behalf before the Special Referee, and he says (Transcript, p. 134) that the creosote is known as a distilled oil which is not a commercial term (Transcript, pp. 137, 139).

The article in controversy, therefore, appears to be described and included in both the paragraphs of the Act hereinefore quoted. Which governs? It is respectfully submitted that the latter (60) should here prevail, because,

(1) *It is more specific than paragraph 443.*

The Board of U. S. General Appraisers said (Transcript, p. 45):

"The provision for distilled oils in paragraph 60 is more specific than the general provision for preparations and products of coal tar in paragraph 443 of the Act."

The Court will observe in reading the testimony, that many, in fact countless thousands of products of coal tar are not distilled oils. Many, for instance, are powders.

> *Vid.* Price's testimony (Transcript, pp 81, 82), Miler's testimony (Transcript, pp. 98, 99), and Searby's testimony (Transcript, p. 114). For instance, we have coal tar fluid (SS. 16,818, G. A. 3,337), coal tar dyes (S. 17,767), ammoniacal gas liquor (SS. 17,441, G. A. 3,615), "creolin-Pearson" (SS. 17,391, G. A. 3,582), acetanilid (*U. S.* vs. *Chemical Co.*, 79 Fed. Rep. 315), phenacetin, etc., etc.

The term "distilled oil" is more specific than the term "preparation of coal tar."

See particularly SS. 10,958, also 17,400, G. A. 3,591, which precede the decision by the Board of Appraisers in the present case; and

Matheson vs. *U. S.*, *71 Fed. Rep., 394,*

where the Circuit Court of Appeals for the Second Circuit held that sulphotoluic acid, which is both an acid and a preparation of coal tar, but not a color or

dye, should be properly classed, under the Act of October 1, 1890, in the phrase (paragraph 473), "Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this Act," and not in the paragraph (19) providing "All preparations of coal tar not colors or dyes, not specially provided for in this Act." * * *

Judge Wallace, in rendering the opinion, said that the phrases "not specially provided for in this Act," found in each of the foregoing paragraphs neutralized each other, and that this case fell "within the "rule that, where an article is designated by a specific "name in one provision of a tariff act, that provision, "instead of another employing general terms, though "sufficiently broad to comprehend it, will fix its "character for the purposes of duty."

The difference in phraseology between the Tariff Act of March 3, 1883, and the later tariff acts we submit deprives the case of

Reiche vs. *Smythe*, 13 Wall., 162,

cited by one of the learned counsel for appellee in the Court below, of any weight here.

The Act of 1883 (22 Stats. at L. at p. 493) specified dead oil as a product of coal tar dutiable at 20 per cent. ad valorem. The Act under consideration provides (under our concession *supra*) that products of coal tar, *not specially provided for*, are free. The merchandise in question, however, is specially provided for as "distilled oil," which, as we have seen, is a more

specific term than "product of coal tar," and this Court said in the case of

Grace vs. *Collector*, *79 Fed. Rep., at p. 319.*

"It is also true that, where the words of the Statute " to be construed differ from the words of a former " Act on the same subject, it is an intimation, at least, " that they are to have a different construction."

It is true that District Judge Townsend in the case of

Warren Chemical Mfg. Co. vs. *U. S., 78 Fed., Rep., 810,*

decided that the article here involved should be admitted free of duty under paragraph 443 of the Wilson Act; but the learned Judge apparently was not thoroughly advised concerning this substance, and could not have had before him such testimony as has been introduced in the case at bar, for he says (p. 811): " It has not been shown, however, that this article is " an oil in fact, or that it is chemically, or commer- " cially, or commonly known, as 'distilled oil.' "

It has been proven in the case at bar that the article is chemically, at least, known as, and is in fact, a distilled oil, and is admittedly called in commerce an oil, " creosote oil."

The learned Judge of the Court below fell into the error of assuming that the testimony in that case was the same as that in the case at bar, and quoted the Court's decision there to sustain a like finding of fact here (Transcript, pp. 55, 56)—a practice which this Court has discountenanced in one of the cases decided by it last term,

Chew Hing Lung vs. *Wise* (*Tapioca Starch Case*).

(2) *The higher of two different rates of duty, both applicable to an imported article, should prevail.*

The latter part of section 4 of the Wilson Act, following *in totidem verbis* the corresponding part of section 5 of the McKinley Act, provides:

"If two or more rates of duty shall be applicable to "any imported article it shall pay duty at the high- "est of such rates."

Paragraph 60 provides a higher rate of duty upon the article in question than paragraph 443. Therefore it should govern; for there is no reason why the government should be given the benefit of the doubt when different amounts of duty are applicable, and denied that benefit because one paragraph puts the article upon the free list. All of the articles named in the Act are referred to in the preamble of that Act. Non-dutiable as well as dutiable articles are technically "articles imported from foreign countries * * * and mentioned in the schedules herein contained," and subject to the "rates of duty" prescribed; and it is submitted the rule of classification just quoted, is here applicable regardless of the comparative rates of duty imposed in different paragraphs relating to the same article. The former rule giving the importer the benefit of any such doubt has thus been changed by express enactment

It is, therefore, respectfully submitted that the decision of the Circuit Court should be reversed.

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